STATE OF MICHIGAN

COURT OF APPEALS

In re DAVIDSON MAGNIFYING GLASS NON-EXEMPT TRUST.

MARLA JANE DAVIDSON KARIMIPOUR and ETHAN D. DAVIDSON,

Appellants,

v

CYRUS I. KARIMIPOUR, Guardian of IAN WILLIAM KARIMIPOUR and CATRIONA A. KARIMIPOUR, GRETCHEN DAVIDSON, Guardian of WILLIAM Z. DAVIDSON, ASHER Q. DAVIDSON, and LEVI M. DAVIDSON, and JOHNATHAN S. AARON and ERIC L. GARBER as Co-Trustees of the DAVIDSON MAGNIFYING GLASS NON-EXEMPT TRUST,

Appellees.

UNPUBLISHED
January 14, 2021

No. 351357
Oakland Probate Court
LC No. 2016-369334-TV

In re DAVIDSON MAGNIFYING GLASS NON-EXEMPT TRUST.

MARLA JANE DAVIDSON KARIMIPOUR, ETHAN D. DAVIDSON, and JOHNATHAN S. AARON and ERIC L. GARBER as Co-Trustees of the DAVIDSON MAGNIFYING GLASS NON-EXEMPT TRUST,

Appellees,

v

No. 351368
Oakland Probate Court

CYRUS I. KARIMIPOUR, Guardian of IAN WILLIAM KARIMIPOUR and CATRIONA A. KARIMIPOUR, and GRETCHEN DAVIDSON, Guardian of WILLIAM Z. DAVIDSON, ASHER Q. DAVIDSON, and LEVI M. DAVIDSON,

Appellants.

LC No. 2016-369334-TV

Before: K.F. KELLY, P.J., AND STEPHENS AND CAMERON, JJ.

PER CURIAM.

In these consolidated appeals,[1] appellants appeal the probate court's October 15, 2019 orders, which held that trustees Johnathan S. Aaron and Eric L. Garber (collectively, "the trustees") were not required to reimburse Marla Jane Davidson Karimipour ("Marla") and Ethan D. Davidson ("Ethan") for the amount of unified credits that were used to compute Marla and Ethan's gift taxes, which were assessed after Marla and Ethan transferred trust property in accordance with the terms of their trust agreements. We affirm in both dockets.

I. BACKGROUND

This appeal concerns two trusts that were established by the late William M. Davidson ("Davidson") for the benefit of Marla and Ethan. The trust agreements permit Marla and Ethan to transfer property from their trusts under certain circumstances, and the trust agreements permit the trustees to reimburse Marla and Ethan for certain taxes that result from transfers of trust property. Marla and Ethan both elected to transfer property from their respective trusts. In doing so, they incurred federal gift taxes, which were offset by unified credits. Marla and Ethan requested reimbursement for the amount of gift taxes that they were required to pay, as well as for the value of the unified credits that they and their spouses were required to use. After Marla and Ethan disputed the trustees' refusal to pay the value of the unified credits, the trustees filed two petitions for limited supervision, seeking instructions from the probate court regarding the administration of the trusts. Appellants filed written responses to the trustees' petitions. Following a hearing, the probate court determined that the trustees were not required to reimburse Marla and Ethan for the amount of the unified credits that were used to calculate their gift taxes. These appeals followed.

II. ANALYSIS

Appellants argue that the probate court erred when it determined that, under the terms of the trust agreements, the trustees were not required to reimburse Marla and Ethan for the full

[1] On November 14, 2019, this Court consolidated the appeals. *In re Davidson Magnifying Glass Non-Exempt Trust*, unpublished order of the Court of Appeals, entered November 14, 2019 (Docket Nos. 351357 and 351368).

amount of gift taxes, i.e., the amount of cash expended as well as the value of the unified credits. We disagree.

"We review de novo a probate court's construction and interpretation of the language used in a will or a trust. When construing a trust, a court's sole objective is to ascertain and give effect to the intent of the settlor." *In re Stillwell Trust*, 299 Mich App 289, 294; 829 NW2d 353 (2012). (quotation marks and citations omitted). "This intent is gauged from the trust document itself, unless there is ambiguity." *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008) (citations omitted). "A court may not construe a clear and unambiguous [document] in such a way as to rewrite it, and, where possible, each word should be given meaning[.]" *In re Estate of Reisman*, 266 Mich App 522, 527; 702 NW2d 658 (2005) (quotation marks, citations, and alteration omitted).[2]

Under Article IV(4)(e) of the trust agreements, if Marla or Ethan "exercises a power of appointment and Transfer Taxes are imposed" as a result of the transfer of trust property, the trustees are required to pay those "Transfer Taxes as provided in the Paragraph entitled Payment of Taxes." In relevant part, Article X of the trust agreements provides the following:

> 1. Payment of Taxes. Following any transfer of Trust Property which results in any Transfer Taxes to the beneficiary of any trust created under this trust instrument, the Trustee shall reimburse such beneficiary or distribute trust property to such beneficiary in accordance with the following:
>
> a. If so directed by the beneficiary or the Personal Representative of the beneficiary's estate, the Trustee shall pay from the remaining property held in a trust for the beneficiary, directly to the appropriate governmental authority, to the beneficiary or to the Personal Representative of the beneficiary's estate, as the Trustee deems advisable, without seeking reimbursement or recovery from any Person, the amount by which the Transfer Taxes payable in any jurisdiction by reason of the transfer are increased.

Thus, in relevant part, the trust agreements provide that, if the beneficiaries transfer trust property and the transfer "results in Transfer Taxes to the beneficiary," the trustees are required to "pay from the remaining property held in a trust for the beneficiary . . . the amount by which the Transfer Taxes payable . . . are increased."[3] Depending on the circumstances, the trustees can

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[2] "The rules in interpreting contracts are equally applicable to interpreting wills," *Czapp v Cox*, 179 Mich App 216, 219; 445 NW2d 218 (1989), and "[t]he rules of construction applicable to wills also apply to the interpretation of trust documents," *In re Estate of Reisman*, 266 Mich App at 527. Thus, when interpreting the trust agreements, we will at times refer to authority that interprets contracts and wills.

[3] The word "shall" is generally used to designate a mandatory provision; it is not permissive. *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875 (2013).

provide the payment "directly to the appropriate governmental authority, to the beneficiary *or* to the Personal Representative of the beneficiary's estate" (emphasis added).[4]

"Transfer Taxes" are defined in Article XVI of the trust agreements to "mean[] . . . any gift taxes, including taxes arising pursuant to [26 USC 2501 through 26 USC 2552], and any gift, transfer or other similar succession taxes imposed by any state resulting from a transfer subject to federal gift tax[.]" Although the definition of "Transfer Taxes" includes "any gift taxes," under Article X, paragraph (1)(a) of the trust agreements, the taxes must also be "payable." The parties vehemently dispute the meaning of the word "payable" on appeal.

The trust agreements do not define the word "payable," and it is therefore necessary to consult a dictionary to ascertain the word's plain and ordinary meaning. *In re Kostin*, 278 Mich App at 54. "Payable" is defined as "that [which] may, can, or must be paid," *Merriam-Webster's Collegiate Dictionary* (11th ed), and as "a sum of money . . . that is to be paid," *Black's Law Dictionary* (11th ed). Similarly, *Random House Webster's College Dictionary* (1997), defines "payable" as "to be paid" or "a bill that is to be paid." "Paid" is the past participle of "pay," and "pay" is defined as "to discharge a debt or obligation" or "to make a disposal or transfer of money." *Merriam-Webster's Collegiate Dictionary* (11th ed). Thus, under the plain meaning of the trust agreements, Marla and Ethan are only entitled to be reimbursed for the amount that they were required to pay in taxes, i.e., that amount of money that they were required to expend to discharge their tax obligations.

The sums of money that were required to be paid—and that were actually paid—to the Internal Revenue Service ("IRS") by Marla and Ethan were their respective gift taxes, which were calculated after the application of the unified credits. Marla and Ethan did not actually pay a sum of money with respect to the unified credits because a unified credit is not a tax that must be paid to the IRS. See e.g., 26 USC 2505. Rather, as evidenced by the facts of this case, a unified credit is used to calculate the gift taxes that must be paid to the IRS, and the credits function to decrease the amount of money owed to the IRS. Accordingly, under the terms of the trust agreements, the amount of gift taxes payable means the amount of gift taxes calculated after the application of the

[4] Appellants argue that the probate court erred by reasoning that the amount payable "shouldn't be a different number depending on who the trustee pays" and that, if the trustees had paid the Internal Revenue Service ("IRS") directly, the sum paid would not have included the unified credit amount. According to appellants, the trustees could have paid the IRS for the gift taxes *and* paid appellants for the value of the unified credits. However, as noted by the trustees, generally, " 'or' is a disjunctive term, indicating a choice between two alternatives[.]" *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010). In contrast, the word "and" is a conjunction that means "with," "as well as," and "in addition to." *Amerisure Ins Co v Plumb*, 282 Mich App 417, 428; 766 NW2d 878 (2009). "When given its plain and ordinary meaning, the word 'and' between two phrases requires that both conditions be met." *Id.* Thus, we find that appellants' argument lacks merit.

unified credits.[5] Consequently, because the use of the unified credits does not constitute payment of a gift tax, the trustees were not required to reimburse Marla and Ethan for the value of the unified credits.

Furthermore, contrary to appellants' arguments on appeal, we conclude that interpreting the trust agreements in this manner does not frustrate Davidson's intent. Article IV, paragraph 4(b)(ii) of the trust agreements granted Marla and Ethan the limited power to appoint shares of their trusts to their "Afterborn Children." That provision also provides that the shares are to be calculated as if the trust property had been divided into equal shares between all of Marla's children and/or all of Ethan's children on the date that the trust agreements were executed. When considered in conjunction with Article X, paragraph 1(a) of the trust agreements, it appears that Davidson intended to encourage Marla and Ethan to exercise their limited powers to appoint trust property in favor of their afterborn children by imposing a duty upon the trustees to reimburse Marla and Ethan for "the amount by which the Transfer Taxes payable . . . increased."

Although these provisions support that Davidson intended to encourage Marla and Ethan to exercise their limited powers, there is no similar indication that Davidson intended to relieve Marla and Ethan of *all* consequences of exercising their limited powers. Indeed, the relevant provisions do not address the use of tax credits, and the trust agreements are silent in regard to the trustees' obligation to reimburse Marla and Ethan for the use of unified credits. It is well settled that trial courts cannot write words into the plain language of an agreement. *Northline Excavating, Inc v Livingston Co*, 302 Mich App 621, 628; 839 NW2d 693 (2013). Furthermore, Marla and Ethan still have a strong incentive to exercise their limited powers. Notably, the trustees are required to reimburse Marla and Ethan for the amount by which their gift taxes payable to the IRS increase. Accordingly, we conclude that interpreting the trust agreements in a manner such that the trustees do not have a duty to reimburse Marla and Ethan for the expenditure of their unified credits is not contrary to Davidson's intent to encourage Marla and Ethan to exercise their limited powers to appoint trust property in favor of their afterborn children.

Finally, appellants argue that the trustees should have reimbursed Marla and Ethan for the value of their respective unified credits under Article IV, paragraph 2 of the trust agreements. This provision provides:

> The Trustee *may* distribute from time to time to the Original Beneficiary as much of the net income and principal of the Non-Exempt Trust as the Trustee in his discretion deems necessary or appropriate (i) for such beneficiary's health,

[5] Appellants disagree with the trustees regarding the manner in which gift taxes are calculated under the Internal Revenue Code. However, regardless of the manner in which gift taxes are calculated, the relevant consideration for purposes of these appeals concerns the sums of money that were actually owed and paid to the IRS by Marla and Ethan. Thus, regardless of the manner in which gift taxes are calculated under the Internal Revenue Code, the amount payable for purposes of the trust agreements remains the same.

education, support and maintenance and (ii) for such beneficiary's General Welfare. [Emphasis added.]

Although appellants are correct that Article IV, paragraph 2 of the trust agreements permit the trustees to distribute the net income and principal of the trusts to Marla and Ethan under certain circumstances, the decision to do so is discretionary. See *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008) (noting that the term "may" generally designates discretion). It is well settled that, "[a]s to those matters which the settlor has left to the discretion of the trustee, the courts will not interfere with the trustee's exercise of his discretion unless the trustee has abused his discretion." *In re Estate of Sykes*, 131 Mich App 49, 54; 345 NW2d 642 (1983).[6] Considering the facts in this case, we conclude that the trustees did not abuse their discretion by declining to reimburse Marla and Ethan for the value of their respective unified credits under Article IV, paragraph 2 of the trust agreements.

In sum, the probate court did not err when it determined that, under the terms of the trust agreements, the trustees were not required to reimburse Marla and Ethan for the amount of their unified credits spent in satisfaction of the federal gift tax associated with the transfers made by Marla and by Ethan.

Affirmed in both dockets.

/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens
/s/ Thomas C. Cameron

[6] Although published opinions issued before November 1, 1990, are not binding under the rule of stare decisis, a court may nonetheless consider such opinions for their instructive or persuasive value. MCR 7.215(J)(1).